

COURT OF SESSION.

Tuesday, June 19.

FIRST DIVISION.

CAMPBELL'S EXECUTORS *v.* CAMPBELL'S TRUSTEES (*ante p.* 12).

Expenses—Jury Trial—Fees to Counsel. Held that in taxation of expenses as betwixt party and party the fees of only two counsel at a jury trial should be allowed except in exceptional cases; and the fees of a third counsel accordingly disallowed.

This case was tried before Lord Jerviswoode and a jury. The trial lasted three days. The defenders, who gained the verdict, had three counsel—the Lord Advocate, the Solicitor-General, and Mr Fraser. In their account of expenses they charged as fees to the Lord Advocate thirty guineas for the first day, twenty for the second, and ten for the third. The same fees were charged for the Solicitor-General; and for Mr Fraser twenty, fifteen, and ten guineas for the three days respectively.

The Auditor reported that if three counsel were to be allowed as against the unsuccessful party (a point which he left to the Court), he thought the fees charged, considering the nature of the case, were not unreasonable.

The defenders maintained that in this case they should not be required to pay for more than two counsel, and also that the fees charged were excessive. They cited on the first point Walker, 19th July 1862, 24 D. 1441; and on the second Cooper and Wood *v.* North British Railway Company, 19th December 1863, 2 Macph. 346; and Hubback *v.* North British Railway Company, 25th June 1864, 2 Macph. 1291.

The Court having taken time to consider, the case was advised to-day.

The LORD PRESIDENT said—It has long been the rule that as betwixt party and party no more than two counsel should be allowed to be charged for against the adverse party, unless in exceptional cases. That rule the Court has no desire to depart from, and the question is whether this is an exceptional case. We think there is nothing in any way exceptional in the present case. The case was no doubt an important one, and to the defenders as well as the pursuers an anxious one, but the parole evidence was not voluminous, and the documentary evidence, though considerable, could not have required much expiscation, for it had been a long time under the consideration of counsel. We are therefore of opinion that one senior and one junior counsel was the proper staff for conducting this case; and we therefore disallow the fees of one of the seniors—it does not matter which, for they are the same in amount. We see no reason for interfering further.

Counsel for Pursuers—Clark, Gifford, and John Hunter. Agents—A. & A. Campbell, W.S.

Counsel for Defenders—Lord Advocate, Solicitor-General, and Fraser. Agents—Webster & Sprott, S.S.C.

CARMICHAEL *v.* ANSTRUTHER.

Res judicata—Competent and Omitted—Heir of Entail. Held (1) that it was no answer to a plea of *res judicata* that there were certain objections to the citation of the defender, these

objections not having been pleaded but waived, or that a defence might have been stated which was not; that being competent and omitted; and (2) that the plea of competent and omitted may be proponed against an heir of entail.

This is an action of declarator and payment at the instance of Sir William Henry Gibson Carmichael of Skirling, Bart., against Sir Windham Carmichael Anstruther of Anstruther and Carmichael, Bart. (1) to have it found and declared that the defender and his heirs and successors in the lands and estate of Carmichael and others, which formerly belonged to James, second Earl of Hyndford, are bound to warrant the teinds, parsonage, and vicarage, of the lands and barony of Skirling and others, disposed as principal by the said Earl of Hyndford and his spouse in favour of Mr William Carmichael, advocate, and his heirs and assignees, by disposition dated the 23d May and 3d June 1724, against all augmentation of minister's stipend, or other burdens imposed or to be imposed in all time coming on the said teinds after the date of the said disposition, over and above the stipend modified to the minister of Skirling on 25th July 1739; (2) to have the defender decerned and ordained to make payment to the pursuer of the sum of £338, 7s. 2d. sterling, being the amount of stipend and augmentation paid by the pursuer to the minister of Skirling for crops and years 1862 and 1863 furth of the teinds of the foresaid lands, over and above the said modified stipend, with interest on said sum; and (3) to have the defender and his heirs and successors ordained to free and relieve the pursuer and his heirs and assignees of all augmentations of minister's stipend or other burdens imposed or to be imposed upon the teinds of the said lands in all time coming.

The pursuer averred—(Cond. 34)—In October 1818 his predecessor in the said entailed lands of Skirling, Sir Thomas Gibson Carmichael, in consequence of the refusal of Sir John Carmichael Anstruther, the then heir of entail in possession of the lands of Carmichael and Anstruther, and his tutors and curators, to satisfy his claim under the said clause of warrandice and obligation contained in the disposition of 1724, raised in the Court of Session an action of declarator and payment against the said Sir John Carmichael Anstruther (otherwise Sir John Anstruther Carmichael), and his tutors and curators, concluding for payment of the sum of £260, os. 10d., being the difference between the stipend and communion elements as modified by the decree of 25th July 1739, and the stipend and communion elements payable to the minister of Skirling for the crop and year 1817, with interest from the date at which the same was paid to the minister, and for decree ordaining the said Sir John Carmichael Anstruther, and his tutors and curators, as defenders and heirs and successors in the said estates of the said James, the second Earl of Hyndford (*i.e.*, the estate of Carmichael) to free and relieve the said Sir Thomas Gibson Carmichael, and his heirs and successors in the lands and barony of Skirling, of and from payment of all augmentations of stipend granted or to be granted to the minister of Skirling, over and above that granted on the said 25th July 1739, in all time to come, from and after the said crop and year 1817. (Cond. 35) To this action defences were lodged by Sir John Carmichael Anstruther and his tutors, and ultimately, on January 31, 1821, decree was pronounced by the Lords of Council and Session, whereby they repelled the